

## **SECTION-BY-SECTION ANALYSIS**

### **National Offshore Aquaculture Act of 2005**

#### **SUMMARY**

The overall purpose of this Act is to provide the necessary authorities to the Secretary of Commerce for the establishment and implementation of a regulatory system for offshore aquaculture in the U.S. Exclusive Economic Zone (EEZ). Specifically, the Act:

- Authorizes the Secretary of Commerce to issue offshore aquaculture permits and to establish environmental requirements where existing requirements under current law are inadequate
- Exempts permitted offshore aquaculture from provisions of the Magnuson-Stevens Fishery Conservation and Management Act
- Authorizes the establishment of a research and development program in support of offshore aquaculture
- Requires the Secretary of Commerce to work with other federal agencies to develop and implement a streamlined and coordinated permitting process for aquaculture in the EEZ
- Authorizes to be appropriated “such sums as may be necessary” to carry out this Act
- Provides for enforcement of the Act.

While the Act provides the Secretary of Commerce with the authority to permit and oversee offshore aquaculture, it also preserves the existing authorities of other federal agencies, States, and Indian tribes and Alaska Native organizations, and requires concurrence from the Secretary of the Interior for aquaculture located on leases or easements authorized or for which a permit has been issued under the Outer Continental Shelf Lands Act (OCSLA), or within one mile of any facility for which a permit has been issued under the OCSLA.

Implementation of this Act will create an enabling environment for the offshore aquaculture industry in the United States in two ways:

- It provides for the establishment of an efficient regulatory process.
- It provides for a research program specifically dedicated to the development of environmentally responsible offshore aquaculture technologies.

#### **SECTION 1. SHORT TITLE**

Section 1 designates this Act as the “National Offshore Aquaculture Act of 2005.”

#### **SECTION 2. FINDINGS**

Section 2 proclaims that it is the policy of the United States to support an offshore aquaculture industry compatible with other uses of the EEZ, encourage the development of responsible marine aquaculture in the EEZ, establish a permitting process for aquaculture in the EEZ, and promote research and development in marine aquaculture. This section also states that U.S. jurisdiction over offshore aquaculture is established under Presidential Proclamation 5030 of March 10, 1983, which declared that the U.S. EEZ extends 200 nautical miles from the coast.

The National Aquaculture Act of 1980 declared aquaculture development to be in the national interest, and included requirements for federal agencies to address barriers to such development. Both the Department of Commerce (in 1999) and, within the Department, the National Oceanic and Atmospheric Administration (NOAA) (in 1998) have endorsed aquaculture policies in support of the National Aquaculture Act, but additional statutory authority is needed in order to establish an enabling regulatory environment for aquaculture in the EEZ. This Act would provide the Secretary of Commerce with the necessary regulatory authority to establish and implement a permitting system, in consultation with other federal agencies, to create such an environment.

### **SECTION 3. DEFINITIONS**

Section 3 defines key terms used in the Act. “Exclusive Economic Zone” is the area extending from the seaward boundary of State/Territorial jurisdiction out to 200 nautical miles from the baseline. The geographic extent of this area is identical to the Exclusive Economic Zone as defined under the Magnuson-Stevens Fishery Conservation and Management Act. “Offshore aquaculture” means all activities involved in the propagation and rearing (or attempted propagation and rearing) of marine species in the EEZ (i.e., beyond State or Territory jurisdiction). “Secretary” means the Secretary of Commerce.

Two types of permits for which the Secretary is given authority under this Act are defined. “Site permits” refer to a specified area of the EEZ that could be used for offshore aquaculture for a specified period of time, while “operating permits” refer to the specified marine species that would be permitted to be raised in a specific offshore aquaculture facility within the area described in the site permit.

Other terms defined include “demonstration”, “Indian tribe and Alaska Native organization”, “lessee”, “marine species”, “offshore aquaculture facility”, “person”, and “State.” “Offshore aquaculture facility” includes areas of the seabed or subsoil used for growing sedentary species, in addition to installations and structures located in the water column or on the surface. “Marine species” excludes birds and mammals. “Person” includes non-U.S. individuals and corporations. “State” includes U.S. Territories and possessions.

### **SECTION 4. OFFSHORE AQUACULTURE PERMITS**

Section 4 authorizes the Secretary of Commerce to establish a process to allow use of the EEZ for offshore aquaculture, gives the Secretary authority to issue site permits and operating permits, establishes criteria for issuing permits under this section, excludes offshore aquaculture from certain provisions of the Magnuson-Stevens Fishery Conservation and Management Act, grants the Secretary of Commerce authority to set fees and to modify or suspend permits issued under this section, and provides certain authorities to the Secretary of the Interior with respect to actions affecting the Outer Continental Shelf.

This section provides the basis for a new federal regulatory system for the offshore aquaculture industry. Many of the details of this system will be developed through rulemaking following enactment of this legislation. The rulemaking process, which will be conducted with stakeholder input, will provide a more appropriate forum for such fine-tuning adjustments than can be accommodated in legislation.

This section outlines the specific authorities granted to the Secretary of Commerce and to the Secretary of the Interior, and establishes specific requirements that must be met in implementing this new regulatory system. The language provides sufficient authority and flexibility to address the full range of anticipated issues through the rulemaking process, and also makes plain that permits issued under the Act do not supersede or substitute for any other required authorizations under other applicable federal or State law (e.g., NPDES permits under the Clean Water Act).

#### **Section 4(a) - General**

Section 4(a) contains provisions that apply to the overall permitting system authorized in the Act.

***Overall process*** - In establishing a process for making areas of the EEZ available for development and operation of offshore aquaculture, the Secretary of Commerce is authorized to develop necessary procedures and to coordinate the permitting process and associated regulations with other federal agencies and States. The Secretary's authority includes the authority to establish how applications for permits will be made and to include special conditions on individual permits. The latter provision ensures the ability of the Secretary to address whatever future concerns are identified with particular aquaculture sites or operations.

Coordination with other federal agencies and States is an important element of the regulatory system established in this Act. Specific agencies are not listed so as to not inadvertently preclude coordination with an agency not listed, and to prevent having to amend this Act in response to future reorganizations or new or amended statutes governing other agencies. Multiple federal agencies have regulatory authority over aspects of offshore aquaculture operations in the EEZ. The U.S. Army Corps of Engineers has been the *de facto* lead permitting agency for offshore aquaculture permits, by virtue of its authority under the Rivers and Harbors Act of 1899 to require a section 10 permit certifying that an offshore aquaculture facility will not interfere with navigation. District Corps offices have coordinated interagency reviews of offshore aquaculture facility applications for section 10 permits and prepared environmental assessments for proposed facilities, with NOAA, EPA, and other federal agency participation in such reviews. The Act establishes specific offshore aquaculture permitting authority for the Department of Commerce and makes the Secretary of Commerce responsible for coordinating offshore aquaculture permitting activities. This will not preempt the authority of other federal agencies, such as EPA's authority under the Clean Water Act to require offshore aquaculture facilities that engage in the discharge of pollutants to obtain a permit, meet ocean discharge criteria, and comply with effluent guidelines.

For offshore aquaculture located on leases or easements authorized or for which permits have been issued under the Outer Continental Shelf Lands Act (OCSLA), or within one mile of facilities for which a permit has been issued under the OCSLA, the concurrence of the Secretary of the Interior is required. Offshore oil and gas platforms are being investigated as potential sites for offshore aquaculture facilities, so the Secretary of the Interior is also given specific authority with respect to offshore aquaculture located on such facilities.

***Permits required*** - Section 4(a) makes it unlawful to engage in offshore aquaculture in the EEZ without two valid permits issued by the Secretary of Commerce: a site permit and an operating permit. The reason for two permits is to establish a general right to use an area of the EEZ for offshore aquaculture (site permit) and a more specific right to locate and operate specific types of aquaculture facilities to grow specific marine species on that site (operating permit). The site permit would establish where the permit holder may operate an offshore aquaculture facility, but the holder would not be allowed to install and operate the facility without an accompanying operating permit. The requirement for permits under this Act does not obviate the requirement for permits under other applicable authorities, such as the Clean Water Act.

***Eligibility for permits*** - Section 4(a) establishes who is eligible to apply for offshore aquaculture permits. Eligibility extends to individuals who are residents of the United States (regardless of citizenship) as well as to corporations, partnerships, and other entities that are organized and exist under the laws of a State or the United States. This does not preclude applications by foreign companies or investors, provided they appoint and maintain agents within the United States who are authorized to receive and respond to any legal process issued in the United States, and, in some cases, waive immunity so as to be subject to U.S. jurisdiction.

***Timely decisions*** - Section 4(a) provides for timely decisions on permit applications in two ways—first, by allowing concurrent submission and review of applications for site and operating permits, and second, by requiring the Secretary of Commerce to render a decision on each permit application within 120 days after determining that a permit application is complete and has satisfied all applicable statutory and regulatory requirements. These provisions are needed to ensure an efficient permitting process in which applicants receive decisions on proposed operations within a reasonable time frame. A prolonged application process is one of the chief criticisms of the current regulatory system for offshore aquaculture. The 120-day requirement will not jeopardize the ability of NOAA or other agencies to satisfy environmental and other review requirements, since the 120-day period would not begin until these requirements have been satisfied. In the event that the 120-day requirement cannot be met, the Secretary is required to provide written notice to the applicant indicating the reasons for the delay and a reasonable timeline for a permit decision.

#### **Section 4(b) - Site Permits**

Section 4(b) gives the Secretary of Commerce authority to issue site permits to eligible persons and requires the Secretary to specify the duration, size, and location of the marine aquaculture facility. The Secretary is given broad latitude to establish whatever specific terms and conditions are deemed necessary for any given site permit; however, the duration of the permit must be for a period of 10 years, renewable at the Secretary's discretion in 5-year increments. This provision is important to an offshore aquaculture business, which requires reasonable assurance of being able to occupy a particular site long enough to return a profit. It is also important to have a sufficiently long permit duration to satisfy financial institutions considering making loans to the aquaculture business. Many coastal States provide such security of tenure for aquaculture in State waters by offering leases.

Two exceptions to the 10-year site permit duration are demonstration projects, and offshore aquaculture located on leases or easements authorized or for which a permit has been issued by

the Department of the Interior under the Outer Continental Shelf Lands Act (OCSLA). In the latter case, the duration of the permit will be developed in consultation with the Secretary of the Interior. For aquaculture located on platforms or other facilities permitted under OCSLA, the permit cannot extend beyond the date on which an oil and gas lessee, or the lessee's operator, submits a final application to the Department of the Interior for removal of the facility upon which the offshore aquaculture facility is located. This is because the OCSLA requires removal of all facilities once production ceases, and it is not anticipated that the aquaculture industry would be interested in assuming liability for removing platforms, given the large costs associated with such an endeavor.

Upon termination of the site permit, the permit holders would be required to remove all structures, gear, and property from the site. The Secretary may also require the permit holder to take other measures to restore the site. For offshore aquaculture located on facilities authorized or for which a permit has been issued by the Department of the Interior under the OCSLA, the current and former OCSLA lessees, as well as the aquaculture permit holder, are liable for removal of any construction or modifications related to aquaculture operations if the aquaculture permit holder fails to do so and bonds posted for the aquaculture facility are insufficient to cover those obligations.

#### **Section 4(c) - Operating Permits**

Section 4(c) authorizes the Secretary of Commerce to issue operating permits to site permit holders. The specific design, construction, and operational details and other information to be provided in the permit application will be determined in the rulemaking process; however, the site permit holder must specify the marine species to be propagated and/or reared at the site. Failure to apply for an operating permit within a reasonable time could result in revocation of a site permit. This requirement is intended to prevent a speculation market for site permits, and to allow the Secretary to revoke the site permit of anyone who for whatever reason is not yet ready, willing, or able to pursue the necessary operating permit for the installation and start-up of an offshore aquaculture facility at the site.

#### **Section 4(d) - Criteria for Issuing Permits**

Section 4(d) requires that the Secretary ensure that aquaculture permitted under the previous sections meets environmental requirements established under other federal and State law and is compatible with other uses of the EEZ, specifically navigation, fishing, resource protection, recreation, national defense (including military readiness), and mineral exploration and development. This section also requires the Secretary to consider risks to and impacts on natural fish stocks, marine ecosystems, water quality, habitat, marine mammals, other forms of marine life, birds and endangered species, and other features of the environment, as identified by the Secretary in consultation with other federal agencies. It also requires compliance with applicable sections of the Coastal Zone Management Act, which requires federal actions to be consistent with approved State coastal management programs, and includes a provision for coordination of any additional consistency certifications required when offshore aquaculture takes place on facilities for which permits have been issued under the OCSLA. The Secretary is required to periodically review and modify the criteria for site and operating permits, as appropriate. This must be done in consultation with other federal agencies and must be based on the best available science.

The intent of these provisions is to provide a degree of predictability as to the types of aquaculture that are more likely to be approved for the EEZ and to provide a way for the concerns of other federal agencies and States to be considered in the decision process.

#### **Section 4(e) - Exclusion from Provisions of Magnuson-Stevens Fishery Conservation and Management Act**

Section 4(e) specifically excludes aquaculture conducted in the EEZ from the definition of “fishing” under the Magnuson-Stevens Act (MSA). This is a very important provision for the offshore aquaculture industry, as MSA provisions that restrict the size, season, harvesting methods, and other aspects relating to the possession of species managed under fishery management plans would render everyday aspects of aquaculture operations illegal. To safeguard wild fisheries, the Secretary is required to ensure, to the extent practicable, that offshore aquaculture does not interfere with MSA conservation and management measures for wild stocks and to consult with the appropriate Fishery Management Councils before issuing a permit under this Act. To facilitate enforcement, the Secretary is also given authority to require permit holders to track, mark, or otherwise identify fish or other marine species from the marine aquaculture facility so as to distinguish them from wild stock.

It should be noted that NOAA has always understood aquaculture to constitute “fishing” for both domestic and international law purposes. It is, therefore, necessary specifically to exclude aquaculture from MSA coverage.

#### **Section 4(f) - Fees and Other Payments**

***Fees*** – Section 4(f) authorizes the Secretary to establish a schedule of application and annual permit fees.

***Bonds*** – Section 4(f) requires the applicant to post a bond or other form of financial guarantee in a sufficient amount (to be established by the Secretary) to cover unpaid fees, the cost of removing a facility, and any other financial risks identified by the Secretary. This requirement reduces the financial risk to the Government of allowing aquaculture development in the EEZ, and provides a vehicle by which the Secretary can set bond requirements commensurate with the risk associated with specific aquaculture operations.

***Right to waive fees*** – Section 4(f) allows the Secretary to waive fees for research facilities, or for facilities raising stock for purposes of stock enhancement. This provision acknowledges that the fee structure may discourage certain aquaculture operations or investments that are in the national interest. Offshore aquaculture is a new industry with significant start-up costs and most new businesses in all types of industries require at least several years of operation before they realize a profit.

***Deposit of fees*** – All fees collected under the authority of this section must be deposited in the Treasury in accordance with the existing miscellaneous receipts statute.



#### **Section 4(g) – Authority to Modify or Suspend Permits**

Section 4(g) grants the Secretary authority to modify or suspend permits issued under the Act if the modification or suspension is found to be in the national interest, after consulting with other agencies as appropriate and giving the permit holder notice and an opportunity to respond. However, if the Secretary determines immediate suspension or modification is necessary, an emergency order may be issued if there are risks to human safety, the marine environment or marine resources, or the security of the United States. In the case of an emergency order, the permit holder would have an opportunity to be heard after the emergency modification or suspension.

#### **Section 4(h) –Actions Affecting the Outer Continental Shelf**

Section 4(h) gives the Secretary of the Interior authority with respect to aquaculture projects and operations located on facilities subject to the OCSLA. This includes the authority to enforce requirements contained in federal mineral leases and OCSLA regulations; require and enforce additional permit terms or conditions; issue emergency orders to permit holders; and promulgate any necessary rules and regulations to implement this section. The Department of the Interior needs this authority in order to meet its health, safety, and other responsibilities on facilities such as oil and gas platforms that may be used for offshore aquaculture. This section also includes provisions relating to agreements between aquaculture and OCSLA operators.

#### **Section 4(i) – Transferability of Permits**

The Secretary is authorized to establish a process for transferring permits from the original permit holder to another person meeting the eligibility requirements and able to satisfy the requirements for bonds or other guarantees.

### **SECTION 5. ENVIRONMENTAL REQUIREMENTS**

Section 5 contains provisions for the establishment of environmental requirements and the monitoring and evaluation of compliance with permit conditions.

These provisions are important not only to environmental nongovernmental organizations (NGOs) and other stakeholders concerned about the potential negative impacts of aquaculture, but also to the aquaculture industry, since they will establish expectations for the aquaculture operations and provide a scientific basis for measuring compliance.

#### **Section 5(a) – Environmental Requirements**

Section 5(a) requires the Secretary to consult as appropriate with other federal agencies to identify environmental requirements under existing laws that are applicable to offshore aquaculture. Although not specifically named, these agencies would include the Environmental Protection Agency, the U.S. Army Corps of Engineers, and others. If necessary, additional requirements may be established by the Secretary of Commerce in consultation with appropriate federal agencies, coastal States and the public. Environmental requirements may include environmental monitoring, data archiving, and reporting. In setting environmental requirements, the Secretary is required to consider risks to and impacts on a range of concerns to be identified in consultation with other federal agencies. These include natural fish stocks, marine ecosystems, biological, chemical, and physical features of water quality and habitat, marine

mammals, other forms of marine life, birds, endangered species, and other features of the environment.

This provision preserves the roles and responsibilities of other federal agencies in establishing environmental requirements under current law (e.g., the Clean Water Act), while giving the Secretary of Commerce authority to impose additional requirements specifically relating to offshore aquaculture activities for which permits are issued under this Act. The intent is to avoid duplicative and/or conflicting requirements, allow the Secretary to fill in any gaps or deficiencies in such environmental requirements, and facilitate the identification of all requirements that apply to an offshore aquaculture operation regardless of which federal agency has primary responsibility.

### **Section 5(b) – Siting, Monitoring and Evaluation**

Section 5(b) authorizes the Secretary to collect information to evaluate the suitability of sites for offshore aquaculture, and to promulgate regulations to facilitate monitoring and evaluation of compliance with permits (including the collection of biological, chemical, and physical oceanographic data as well as social, production, and economic data). This section also authorizes the Secretary to monitor the effects of aquaculture on marine ecosystems, implement measures to ensure compliance with environmental requirements, and establish monitoring and evaluation protocols. Remedial measures may include the temporary or permanent relocation of sites or a moratorium on additional sites within an area. The intent of this provision is to ensure monitoring of the cumulative impacts of all offshore aquaculture as well as the impacts of individual operations in the EEZ according to a common set of monitoring and evaluation protocols.

## **SECTION 6. RESEARCH AND DEVELOPMENT**

Section 6(a) authorizes the Secretary of Commerce, in consultation with other federal agencies, to establish an integrated, multidisciplinary, scientific research and development program to further offshore aquaculture technologies compatible with the protection of marine ecosystems. Although not specified in the legislation, eligible areas of research would include scientific, social, legal, and environmental management issues.

Section 6(b) authorizes the Secretary to conduct research and development in partnership with site permit holders.

This section preserves the roles and responsibilities of other federal agencies with respect to aquaculture, as well as acknowledging the need to cooperate with industry for purposes of data collection as well as research and development.

## **SECTION 7. ADMINISTRATION**

Sections 7(a) and 7(b) require the Secretary to promulgate, prescribe, and amend rules and regulations to carry out this Act, including authorization to protect offshore aquaculture facilities and, where appropriate, to request the Coast Guard to establish navigational safety zones. Section 7(b) also includes language specifying the authority of the Coast Guard to establish such zones.



Section 7(c) requires the Secretary to consult as appropriate with other federal agencies that are authorized to issue permits within the EEZ to promulgate regulations to establish and implement a coordinated and streamlined permitting process. This section requires that the process factor in the needs, requirements, and authorities of other federal agencies, including the need for consultation with State agencies and for public review and involvement. Although not specifically named, relevant agencies would include the Environmental Protection Agency, Minerals Management Service, the Army Corps of Engineers, and others.

Section 7(d) specifically authorizes the Secretary to establish agreements with other agencies (i.e., memoranda of understanding, memoranda of agreement, etc.) to implement this Act. It also authorizes the Secretary and other agencies to issue regulations to ensure coordination of federal activities to implement this Act.

Section 7(e) authorizes the Secretary to enter into agreements with other federal agencies and with State agencies relating to the use of personnel, services, equipment, and facilities, with or without reimbursement, for purposes of this Act.

Section 7(f) specifies that this Act is not intended to preempt the jurisdiction, responsibility or rights of other federal agencies, State agencies, or Indian tribes or Alaska Native organizations under any federal law or treaty. The intent of this provision is to eliminate the need to reference each and every statute or treaty that applies in the EEZ by stating that this Act will not preempt any existing authorities.

Sections 7(g) and 7(h) provide extraterritorial jurisdiction to protect offshore aquaculture facilities under U.S. law. It is not intended to supersede this Act or any other federal laws and regulations that apply in the EEZ - e.g., the Clean Water Act. Specifically, this section does not extend States' Clean Water Act jurisdiction beyond their current boundaries.

## **SECTION 8. AUTHORIZATION OF APPROPRIATIONS**

Section 8 authorizes to be appropriated to the Department of Commerce "such sums as may be necessary for purposes of carrying out the provisions of this Act." Implementation of the Act will require funding to cover the costs of developing and implementing a regulatory and administrative system for offshore aquaculture, supporting internal and external R&D, developing environmental requirements, and monitoring, compliance, and enforcement.

## **SECTION 9. UNLAWFUL ACTIVITIES**

Section 9 outlines activities that are unlawful under the Act. Unlawful activities include, but are not limited to, falsification of information; engaging in offshore aquaculture except in full compliance with this Act; obstruction of lawful enforcement activities such as search or inspection; interference with lawful search or inspection by an enforcement officer; resisting or interfering with an arrest; or violation of any provisions, regulations, or permits under this Act.

## **SECTION 10. ENFORCEMENT PROVISIONS**

Section 10 grants enforcement authority under the Act to the Secretary of Commerce and the Secretary of the Department in which the Coast Guard is operating, and authorizes agreements for the use of personnel, services, equipment and facilities of other federal and State agencies in

enforcing this Act. It is not intended to be used to extend arrest powers to additional personnel or components. Section 10 also grants exclusive jurisdiction over cases arising under the Act to U.S. district courts, specifies the powers of enforcement officers, provides for the issuance of citations (that is, written warnings), holds violators subject to certain costs associated with the storage, care, and maintenance of seized property, and includes an injunctive relief provision.

#### **SECTION 11. CIVIL ENFORCEMENT AND PERMIT SANCTIONS**

Section 11 provides for both civil administrative and civil judicial penalties. Section 11 also grants the Secretary the authority to revoke, suspend, deny, and impose additional conditions or restrictions on a permit holder found to be committing or to have committed an unlawful activity under the Act. This section also contains provisions relating to hearings, judicial review, and the collection of civil penalties. Civil administrative penalties assessed by the Secretary may not exceed \$120,000 per violation, with each day of a continuing violation considered a separate offense. Civil judicial penalties may not exceed \$240,000 per violation, with each day of a continuing violation considered a separate offense.

#### **SECTION 12. CRIMINAL OFFENSES**

Section 12 identifies criminal offenses and associated maximum fines and prison terms, specifies violations that are Class C felonies, and establishes federal jurisdiction over these offenses.

#### **SECTION 13. FORFEITURES**

Section 13 provides for the forfeiture of property seized in the enforcement of this Act, and specifies the jurisdiction with respect to such forfeitures as any district court of the United States. The section includes provisions on judgments and procedures, and a rebuttable presumption.